

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL JOHN MORGAN,) CASE NO.: C08-1587-MJP
Petitioner,)
v.) REPORT AND RECOMMENDATION
SHELIA GEORGE,)
Respondent.)

INTRODUCTION

Petitioner has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. No. 1). The Court screened the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, and noted that the petition appeared to be untimely.¹ Accordingly, the Court ordered petitioner to show cause why the petition should

¹ Rule 4 provides that once the Clerk of Court receives a habeas petition, “[t]he clerk must promptly forward the petition to a judge under the court’s assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief . . . the judge must dismiss the petition” Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court.

01 not be dismissed. (Dkt. No. 3). Petitioner has filed a response to the Court's Order. (Dkt. No.
02 4). Having reviewed the response, the Court finds, for the reasons set forth below, that the
03 petition is untimely and should be dismissed.

04 **BACKGROUND**

05 Petitioner, a former federal immigration officer, has finished serving a 38-month prison
06 term for vehicular homicide imposed by Whatcom County Superior Court in 2003. Petitioner's
07 conviction was upheld by the state appellate courts. *See State v. Morgan*, 123 Wash. App. 810
08 (2004), *review denied, State v. Morgan* , 154 Wash. 2d 1018 (2005). Petitioner is currently
09 serving the "community custody" portion of his sentence in Everson, Washington. He alleges in
10 the habeas petition that his 2003 conviction was the result of perjury by the State's lead witness
11 and investigator. (Dkt. No. 1 at 8). Petitioner raised the same claim in federal court in 2006 when
12 he filed a document entitled "Notice of Removal." *See Morgan v. Washington*, Case No. C06-
13 787-TSZ. However, this Court dismissed that Notice of Removal after concluding that the statute
14 upon which petitioner relied, 28 U.S.C. § 1442, had a time limit for removal which had expired.
15 (Dkt. No. 3 in Case No. C06-787-TSZ). The Ninth Circuit Court of Appeals affirmed this
16 dismissal on December 8, 2006. (Dkt. No. 11 in Case No. C06-787-TSZ).

17 After petitioner's Notice of Removal was dismissed by this Court, petitioner returned to
18 state court and sought collateral review of his conviction through a personal restraint petition
19 ("PRP") which he filed on March 20, 2007. (Dkt. No. 1 at 5). The Washington Court of Appeals
20 found that the PRP was time-barred under the state's one-year statute of limitations and dismissed
21 the PRP. (Dkt. No. 1, attached exhibit). The Washington Supreme Court Commissioner denied
22 petitioner's motion for discretionary review. (Dkt. No. 1, attached exhibit).

01 Petitioner filed the instant habeas petition on October 28, 2008. Noting that petitioner's
02 petition appeared untimely under the one-year statute of limitations set forth in the Antiterrorism
03 and Effective Death Penalty Act of 1996 ("AEDPA"), the Court directed petitioner to show cause
04 why the petition should not be dismissed. (Dkt. No. 3). Petitioner has filed his response and the
05 matter is now ready for review.

06 DISCUSSION

07 The Court is permitted to raise on its own the timeliness of a habeas petition. *See Day v.*
08 *McDonough*, 547 U.S. 198 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1042-43 (9th Cir. 2001).
09 Petitions filed pursuant to 28 U.S.C. § 2254 are governed by AEDPA's one-year statute of
10 limitations. Under AEDPA, the one-year limitation period begins to run from the latest of four
11 possible dates:

12 (A) the date on which the judgment became final by the conclusion of direct review
13 or the expiration of the time for seeking such review;

14 (B) the date on which the impediment to filing an application created by State action
15 in violation of the Constitution or laws of the United States is removed, if the
16 applicant was prevented from filing by such State action;

17 (C) the date on which the constitutional right asserted was initially recognized by the
18 Supreme Court, if the right has been newly recognized by the Supreme Court and
19 made retroactively applicable to cases on collateral review; or

20 (D) the date on which the factual predicate of the claim or claims presented could
21 have been discovered through the exercise of due diligence.

22 28 U.S.C. § 2244(d)(1).

23 The statute creates a general rule, contained in paragraph (A) above, followed by three
24 exceptions. The Court previously found that the general rule applied here and that petitioner's
25 conviction became "final" on August 31, 2005. (Dkt. No. 3 at 3). The one-year statute of

01 limitations thus expired one year later, on August 30, 2006. Petitioner did not file the instant
02 habeas petition until more than two years after that date, making it presumptively untimely.

03 In his response to the Court’s Order to Show Cause, petitioner does not challenge the
04 Court’s recitation of the facts nor the Court’s conclusion that the petition is untimely. Instead,
05 he contends that the state court was incorrect in ruling that his PRP was time-barred and he asks
06 the Court to “reverse the state courts [sic] decision that I am time barred so that I can present my
07 case.” (Dkt. No. 4 at 5). Petitioner appears to argue that he intentionally missed the one-year
08 deadline for filing a PRP because instead of returning to state court, he chose to seek relief in
09 federal court in May 2006, when he filed his “Notice of Removal.” (Dkt. No. 1 in Case No. C06-
10 787-TSZ). Petitioner states that he based his decision to file in federal court on his fear that he
11 would not receive a fair hearing in state court. (Dkt. No. 4 at 2). Petitioner argues that when he
12 finally did file a PRP in state court, on March 20, 2007, the state court should have considered the
13 PRP timely because it should have held that the filing of the Notice of Removal in federal court
14 had tolled the one-year statute of limitations for filing the PRP. (Dkt. No. 4 at 3-4).

15 Petitioner’s argument is unavailing. His request that this Court “reverse the state courts
16 [sic] decision” implies that he considers a federal habeas court to function as another level of
17 appellate review to revisit decisions of the Washington appellate courts. However, this view
18 misapprehends the role of federal courts when they exercise their habeas jurisdiction. Under the
19 statute governing habeas actions, this jurisdiction is very limited; to obtain relief, petitioner must
20 show that the relevant state court decision is either contrary to, or involved an unreasonable
21 application of clearly established federal law, as determined by the Supreme Court. *See* 28 U.S.C.
22 § 2254(d). Petitioner has not cited any federal case, let alone one decided by the Supreme Court,

01 that has held that a state court must find that proceedings in federal court toll state statutes of
02 limitations. Interpreting a state statute, such as the statute of limitations for a PRP, is the
03 quintessential role of the state courts, and federal courts are bound by state courts' interpretation
04 of state law. *See Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir. 2004). For this Court to
05 override a Washington state court's ruling on the timeliness of petitioner's PRP would be
06 inconsistent with the limited role of federal courts under their habeas jurisdiction.

07 Consequently, the Court finds that petitioner has not adequately responded to the Court's
08 Order to Show Cause and his habeas petition should be dismissed as untimely.

09 CONCLUSION

10 For the foregoing reasons, petitioner's petition for a writ of habeas corpus should be
11 dismissed as untimely. A proposed Order reflecting this recommendation is attached.

12 DATED this 6th day of January, 2009.

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15 Mary Alice Theiler
16 United States Magistrate Judge
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